United States Court of Appeals

for the Second Circuit

REPLY BRIEF

74-1565

IN THE

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

NO. 74-1565

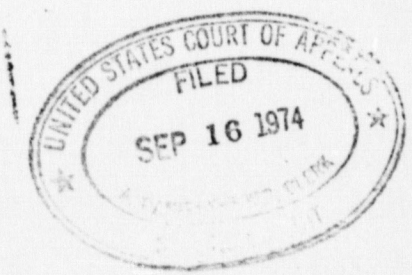
UNITED STATES OF AMERICA,

RESPONDENT-APPELLEE :

vs

FRANCISCO SOLIMENE,

PETITIONER-APPELLANT :



REPLY BRIEF

PETITIONER-APPELLANT-PRO SE
(with assistance)

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Respondent-Appellee

-VS-

FRANCISCO SOLIMENE,
PETITIONER-APPELLANT

REPLY BRIEF

PETITIONER-APPELLANT Pro-se
(with assistance)
FRANCISCO SOLIMENE
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STATEMENT

The necessity of this reply brief is that the Petitioner-Appellant, (hereinafter Appellant) believes that the Respondent-Appellee, (hereinafter Appelle) has failed to join issue and has drifted from the main artery of this appeal. The issue consolidated is, simply: "Was the District Court acting properly when it denied the Appellant a hearing on his Rule 35 motion based on a sentence being rendered on mis-information in his pre-sentence report?" It is established that mis-information is present. The conflict in the pre-sentence report is: That the Appellant claims he is a minor figure in the case which is supported by the trial record and that a safety deposit boxes ownership of contents, and who rented it, was erroneously connected to Appellant. The pre-sentence report characterizes the Appellant as a major figure in the alleged operation and it also states that eighty-seven thousand dollars ($87,000.00) in a safety deposit box that was rented by him belonged to Appellant. There is no basis to substantiate such allegations in the pre-sentence report. The trial transcript itself completely discredits one claim for it was a statement by the governments own attorney who said:

> "....He's not the top dog. You can tell how people treat him, the way he acts, and the things he does..." (line 24 at Page 1183 thru line 13 Page 1184)
> (Appellant's opening Brief Page 10)

Ownership of the safety deposit box, (rental) or the Eighty-Seven thousand dollars ($87,000.00) was never proven by the government. Naturally, Appellant realizes that this court is not a trier of fact but a supervisory body of the District Courts. The erroneous informations impact on the Appellants sentence is almost impossible to establish because of the Honorable Judge George Rosling's passing. It is reasonable to assess, however, that its impact was substantial because of the harshness of the sentence on a first offender. A review by Judge Rosling, without mis-information, may have led him to reconsider and resentence the Appellant to a lesser sentence. Who is to say? Appellant is, therefore, being denied a proper review and suggests that only a factual pre-sentence report and resentencing can remedy. Appellant is an Immigrant with a very limited education bordering on illiteracy, his command of the English language is only of common everyday words, Hello, Goodbye, etc., he neither read nor understood what was in the pre-sentence report that was determinate to him regarding the degree of sentencing. The appellee on Pages 4 and 5 of their brief which is headed "Sentence Proceedings" attempts to capitalize on three items: One, that Appellant was

given, through his attorney, a copy of the pre-sentence report: Two, that Appellant was asked if he had anything to say, and three, Appellant thanked the Judge after sentencing by asking "May I thank you?" Judge Rosling said: "If you wish." Naturally, this Court cannot, by reading the point blank words in a brief, transcript, or court orders, acquire a true circumstance of the proceedings dealing with dialectic and observation. When Appellants attorney reviewed the pre-sentence report, Appellant was present; but does this mean he knew its content or understood it? A doctor of medicine reads a report then prescribes a medication after he diagnosis the illness; does that mean the patient understands the report? Appellant, when asked by the Judge if he had anything to say, replied inthe negative; because he did not know what to say. After Appellant was sentenced by the Judge to a fifteen (15) year prison sentence and a special parole term of fifteen (15) years, he asked, "May I thank you?", why?, because Appellant heard the words "Special Parole", and thought he was being put on parole for fifteen (15) years. These matters can all be resolved by an evidentiary hearing; a hearing required to establish fact. Must Appellant suffer because of his unfortunate illiteracy; his failure to conquer the English language or, most importantly, because of mis-information of an erroneously prepared report? Years of a mans life should not be taken so easily or un-justly.

The U.S. Supreme Court has recognized the value of the pre-sentence report by saying: "(Pre-sentence Reports) have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guess work and inadequate information. To deprive sentencing judges of this kind of information would undermine modern Judicial Proceedural policies that have been cautiously adopted throughout the nation after careful consideration and examination.

WILLIAMS v NEW YORK (1949) 337 US 241, 93 L ED 1337,69 S. CT. 1079, CERT. DEN. 337 US 961, 93 L ED 1760, 69 S. CT. 1529, CERT DEN. 338 US 841, 94 L ED 514, 70 S. CT. 34

ARGUMENT

In its present procedural posture, this appeal presents one fundamental issue: When a federal prisoner proceeding under Rule 35 presents a well-stated claim which is not susceptible to rebuttal by the record, is he entitled to be heard? This question of law reduces itself to three subsidiary issues: (a) Has a claim been stated? (b) If so, has it been foreclosed by the record? (c) If not, must a hearing be held? The correct resolution, Appellant suggests, mandates a hearing.

(1) Because a claim has been stated.

(2) The claim is shown to have validity by the record.

(3) Appellant has a right to be heard.

In Avery v. United States, _____ F.2d_____: the Fifth Circuit Court of Appeals stated a motion to vacate or correct sentence is available to test whether information in a presentence report was relied upon by the sentencing Judge and whether such information was erroneous.

Criminal Law - 997.4: In Limited circumstances, a motion to vacate or correct sentence, is available to test whether informationin pre-sentence report was relied upon by sentencing Judge and whether such information was erroneous. 28 U.S.C.A. Sec. 2255; Federal Rules Criminal Procedure - Rule 35, 18 U.S.C.A.

In Judge Mishler's order denying relief on Appellant's Rule 35 Motion, he states:

> "The defendant describes himself as a 'minor figure' in the conspiracy. The pre-sentence report relating the details of the conspiracy indicates that defendant was a major participant in the conspiracy."

A clear controversy appears not with Appellants claim, but with the Courts own records. The transcript clearly shows where the governments own attorney states Appellant was a minor figure. Judge Mishler also states, erroneously, that Appellant maintained a safe deposit box. This, too, is a controversy, for Appellant disclaims the maintainces of the box. The District Court relied upon the very same mis-information, complained of by the Appellant originally, as the basis for the Rule 35 Motion to deny relief. This fact is incomprehensible to the Appellant. Surely his right to be heard on the controverted issue must have some weight in the Courts. Appellant has alleged facts with a foundation of the Courts own records which require the trial court to look beyond the pre-sentence report. To continually use the same information will not only make Appellant suffer immediately by the harshness of the sentence on a first offender, but all subsequent considerations (Honor status placement of a medium or minimum institution, work release, parole, etc.) may be governed by the false information. The pre-sentence report and trial records create a controversy as before

stated. The resolution of these controverted issues are those similar to the ones that occurred in Machibroda v. United States, 368 U.S. 487 (1962); there, two affidavits were filed; one by Machibroda, and one by the Government both alleging different facts. The Supreme Court stated:

> "There can be no doubt that, if the allegations contained in the Petitioner's motion and affidavit are true, he is entitled to have his sentence vacated...."

Although Machibroda attacks a guilty plea, the reasoning of, "There can be no doubt", is applicable here. Doubt has no place in a Court of Justice. I am sure this court will agree. Who can definitely state the reasons why an accused remains silent in the Court at the time of sentencing? The Appellee is attempting to capitalize on the Appellants act of remaining silent. After reading the Pre-sentence report, as explained prior in this brief as well as the opening brief, Appellant is an Immigrant and semi-illiterate. However, the silence of an accused, who even understands what is transpiring, does not foreclose further inquirey. The tenuous validity which the Fifth Circuit Court of Appeals appropriately accords to pre-sentence inquires relating to inducements, is dramatically illustrated by the habeas corpus case of Ross v. Wainwright, 451 F.2d 298, which also goes into the silent doctrine. There, the defendant clearly stated into the record at the time of pleading that he had received no promises with respect to the length of a sentence. In a subsequent

habeas corpus petition, which was denied without hearing by a state court, he asserted that his attorney and the prosecutor had struck a plea bargain concerning sentencing which had not been honored. Despite the seeming clarity of the record and the holdings of three state courts on the strength of that record, the Fifth Circuit concluded that the petitioner's allegations, although arguably belied by the transcript, were entitled to factual development. If this exacting standard of Ross is to be applied in the constitutional review of state criminal proceedings, surely it would be anomalous to insist upon a lesser standard for federal trial courts, over which this court exercises supervisory control as well as constitutional review. There are many, many cases which hold that silence itself does not foreclose further inquirey.

CONCLUSION

Appellant merely asks that this case be remanded to the District Court for a hearing for the purpose of correcting the false information in the pre-sentence report; and to have his sentence vacated and be resentenced on a truthful and factual pre-sentence report. Justice requires no less.

Respectfully Submitted,

Francisco Solimene

(Francisco Solimene
with assistance)

CERTIFICATE OF SERVICE

I hereby certify that on 12 SEPTEMBRE, 1974, I served the foregoing brief of the Petitioner-Appellant on the Attorney of Record for the Respondent-Appellee, addressed as shown below by placing same in the United States Mail.

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Francisco Solomene
Francisco Solomene

Dated this 12 day of SEPTEMBRE, 1974.